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CABLE ADDRESS
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August 8, 1994

92-266

Meredith Jones
Chief of the Cable Services Bureau
Federal Communications Commission
2033 M Street, NW
Room 918
Washington, D.C. 20554

Re: <u>Programming External Costs – Confidential Contracts</u>

Dear Ms. Jones:

On behalf of numerous cable television programmers and operators represented by this firm, we seek clarification as to the process under which cable operators may pass through external costs pursuant to Section 76.922(d)(3). In the next few weeks cable operators will begin filing FCC Form 1210 to reflect increased programming costs as external pass throughs on both their basic cable service tier and cable programming service tier. The FCC Form 1210 requires operators to provide the specific aggregate increase or decrease in programming costs on a tier by tier basis. (See FCC Form 1210, page 4, Module B).[1] We seek clarification that in requesting approval of external programming cost pass throughs on the basic level of service, cable operators are not required to provide individual programming contracts to local franchising authorities.

[1] Also see FCC Form 1200, Modules B and I which require the same aggregate programming cost disclosures.

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Programming affiliation contracts are negotiated individually with each cable company and include MSO-wide national agreements. The negotiations and the resulting contract between the programmer and the cable company are often extraordinarily complex, contentious and, almost without exception, confidential. For most programmers, affiliation contract rates, terms and conditions vary from MSO to MSO with a multitude of factors affecting programming rates. Variables such as subscriber guarantees, penetration triggers, possible programming surcharges for new programming acquired during the term of the contract and many other factors all can play a role in establishing the rate structure or formula by which a cable company's programming rates will be set. Numerous other affiliate contract provisions (the geographic scope of the license granted, the uses which may be made of the programming, and other aspects of the contractual relation) are also subject to extensive negotiation and are established on a company by company basis. The underlying premise allowing programmers to negotiate these contracts is that all such contracts will remain confidential. This traditional understanding of confidentiality between the programmer and the cable operator has helped to ensure successful negotiations over the past several years and has helped in the development of new programming services.

Programmers certainly will seek to enforce contract confidentiality provisions in the context of operators seeking external cost approvals from local franchising authorities. Because the FCC Form 1210 specifically requires aggregate programming cost increases or decreases, it is our understanding that franchising authorities will not be allowed to request individual programming contracts. However, we are concerned that some franchising authorities may request programming contracts and that when operators justifiably refuse to provide such contracts, the external programming cost pass through will be denied or delayed. We also fear that this will become a tactic of widespread use for delay or denial of all programming cost pass throughs -- whereby the Form 1210 process will essentially grind to a halt. Such a result would directly conflict with the Commission's efforts to ensure that cable operators have the ability to pass through programming costs on a timely basis. (See FCC Rule § 76.922(d)(3)(i) allowing for quarterly external pass throughs). The clarification sought here is necessary to ensure that the orderly external programming cost process envisioned by the Commission not be derailed.

In addition to programming contract confidentiality requirements, there are both practical and legal reasons operators will not provide programming contracts to franchising authorities -- even under a promise of confidentiality from the franchising authority. On a practical level, the concept of making these confidential programming contracts available to potentially thousands of individual franchising authorities virtually ensures that the confidentiality will not be maintained. Even with the best of intentions, such massive distribution of confidential contracts will quickly result in public disclosure. Further, in certain states, municipalities do not have the legal ability to maintain confidentiality. In Florida, for example, the state public records law does not recognize the confidentiality of financial data and proprietary business information. Any submission of such information to a municipality would be deemed available to the public. Fla. Stat. §119.01-.16 Thus, for both practical and legal reasons, providing confidential programming affiliation contracts to franchising authorities across the country will result in the public disclosure of those contracts.

While we believe this clarification is essential to an orderly FCC Form 1210 process, we also recognize certain franchising authorities will want some accountability regarding the Form 1210 aggregate programming cost figures provided by operators. We believe that such accountability can be provided as follows:

1. The operator submits FCC Form 1210 with all appropriate aggregate programming cost increases or decreases provided. If the franchising authority is satisfied with these numbers and does not request any backup accounting, the Form 1210 process moves forward as contemplated by the Commission.

2. If, after receiving the Form 1210, the franchising authority requests an accounting of the aggregate 1210 programming cost increases, the cable operator can meet this request by providing a certification from an independent accounting firm retained by the cable operator to review the relevant programming contracts and to calculate the appropriate programming cost increases or decreases. The accounting firm selected by the cable operator must be a recognized and established accounting firm. The cost of the accounting certification would be borne by the cable operator. Upon receipt of the accounting certification, the Form 1210 process would proceed without delay.

3. If after receipt of the accounting certification, a franchising authority desired further verification, a request to the Federal Communications Commission could be made for an <u>in camera</u> review of the programming contracts in question by the Commission. Pending Commission review, however, the Form 1210 process would not be delayed. If the Commission's <u>in camera</u> review ultimately determined that the programming cost figures provided by the cable operator were inaccurate, appropriate refunds and/or forfeitures could be ordered. The benefits of streamlining any programming contract review to <u>in camera</u> Commission

review are many. First, the likelihood of inadvertent and inappropriate disclosure of confidential information is dramatically reduced when that review is confined to a single Federal agency as opposed to potentially thousands of franchising authorities. Second, most programming affiliation contracts with cable MSOs are MSO-wide, thus allowing the Commission's review of one contract to cover potentially thousands of franchising authorities with a uniform answer. Third, given the complexity of some of the pricing structures discussed above, the Commission will be better prepared to review such price structures than will be individual franchising authorities. Fourth, franchising authorities will not be required to spend significant fees on consultants to review the same national MSO contracts the Commission could review once. Fifth, because franchising authorities will have the assurance that the veracity of programming cost increases can be reviewed by the Commission, it is much more likely that franchising authorities will recognize that there is no incentive for a cable operator to misrepresent such programming costs and, therefore, the entire Form 1210 process will move forward more smoothly with minimal contract review requests.

We believe that this procedure would be fully consistent with the announcement in ¶77 of the Third Report that "franchising authorities are entitled to request information, including proprietary information, that is *reasonably necessary* to make a rate determination, ... to ensure the validity of the information provided in order to arrive at a determination of the reasonableness of the rates proposed . . . ." The process of certification and Commission in camera review ensures the validity of the information while avoiding the unnecessary disclosure of confidential programming contracts. It is also analogous to the protections afforded to the confidential information relied upon by Local Exchange Carriers in SCIS Disclosure Order, In the Matter of Commission Requirements for Cost Support Material to be Filed With Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (1992).

The Form 1210 process for programming cost externals will begin next month. Further, this same external programming cost issue arises in many Form 1200 filings which are imminent. We therefore respectfully request that the Commission provide an expedited clarification so that the FCC Form 1200 and 1210 process may move forward.

Should you desire additional information, please feel free to contact the undersigned.

Sincerely,

Wes Heppler

Wes Heppler
Paul Glist

cc: Merrill Spiegel (Commissioner Hundt's Office) (via Hand Delivery)
Maureen O'Connell (Commissioner Quello's Office) (via Hand Delivery)
Lisa Smith (Commissioner Barrett's Office) (via Hand Delivery)
Jill Luckett (Commissioner Chong's Office) (via Hand Delivery)
Mary McMannis (Commissioner Ness' Office) (via Hand Delivery)
William Johnson (Cable Bureau) (via Hand Delivery)

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October 28, 1994

92-266

Via Hand Delivery

Meredith Jones
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, NW
Room 918
Washington, D.C. 20554

Re: **Programming External Costs -- Confidential Contracts**

Dear Ms. Jones:

The purpose of this letter is to again request expedited clarification from the Commission regarding the programming contract review process discussed in our August 8, 1994 letter. Additionally, this letter will address certain claims made in an October 20, 1994 letter to you from the law firm of Miller, Canfield, Paddock and Stone ("Miller, Canfield").

Regarding the Miller, Canfield letter, it is certainly not surprising that city consultants would prefer that thousands of individual franchising authorities each review confidential programming contracts in order to verify the aggregate programming cost externals. This would create the most time-consuming, labor intensive and inefficient regulatory enterprise imaginable within the Cable Act's rate regulation framework. Although such a process would be a bonanza for attorneys representing franchising authorities (and cable attorneys for that matter) it is simply bad communications policy. The Miller, Canfield letter incorrectly states that the Commission might be required to review "thousands" of

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programming contracts. The reality, of course, is that the vast majority of all cable franchises and subscribers are covered by MSO-wide programming contracts. Each MSO's programming contracts will be identical for the thousands of franchise areas the MSO serves. This is the critical point of our August 8, 1994 proposal -- the Commission can efficiently and uniformly review these programming contracts to ensure that such programming externals are interpreted consistently nationwide. Further, the Commission will have the opportunity to review these same MSO-wide programming contracts in its cable programming service tier rate proceedings. The only way there will be "thousands" of programming contract reviews is if consultants for the thousands of individual franchising authorities are allowed to review these program contracts time and time again on a franchise-by-franchise basis.

As the Commission well knows from its programming access proceedings, virtually every cable programmer requires confidentiality in their programming contracts. The process proposed by Miller, Canfield of allowing every franchising authority to decide whether they deem such programming contracts to be sufficiently confidential is an invitation for massive administrative delay -- rendering programming pass through incentives meaningless. It is an obvious and easy strategy for a franchising consultant to advise a city to ask for every confidential programming contract as a pre-condition to approving external programming cost increases.

As opposed to unending delays and programming contract disclosure litigation on a franchise-by-franchise basis, there are numerous benefits of streamlining programming contracts review to an efficient in camera Commission review process.

- First, the likelihood of inadvertent and inappropriate disclosure of confidential information is dramatically reduced when that review is confined to a single Federal agency. On a practical level, it is simply unrealistic to imagine that thousands of franchising authorities will maintain the confidentiality of these programming contracts -- most of which are national in scope.

- Second, because most programming affiliation contracts are MSO-wide, the Commission's review of one contract will cover potentially thousands of franchising authorities and provide a uniform answer.

- Third, in the context of its review of cable programming service tier rates, the Commission will have the opportunity to review many, if not all, of the same nation-wide contracts.

- Fourth, given the complexity of some of the programming contract pricing structures, the Commission will be better prepared to review such price structures than will individual franchising authorities.

- Fifth, franchising authorities will not be required to spend significant fees on consultants to review the same national MSO contracts the Commission could review once.

- Sixth, because franchising authorities will have the assurance that the veracity of programming cost increases can be reviewed by the Commission, it is much more likely that franchising authorities will recognize that there is no incentive for a cable operator to misrepresent such programming costs and, therefore, the entire Form 1210 process will move forward more smoothly and with minimal contract review requests.

- Seventh, allowing the external programming cost increases to go into effect subject to any adjustment required by FCC review will ensure that there is a legitimate incentive to add or improve such programming and that such incentives will not be stymied by the endless delay of local contract reviews. Further, the Commission's authority to order refunds and impose sanctions on a national basis for any inaccurate MSO-wide programming externals virtually will ensure that such inaccuracies will not occur.

Finally, we would note that this has nothing to do with interfering with a local franchising authority's right to regulate rates, but has everything to do with ensuring an efficient process for confirming the accuracy of numbers provided to those franchising authorities.

As predicted in our August 8 letter, the Form 1200 and Form 1210 programming external pass through process has now reached a point requiring Commission guidance regarding these confidential programming contracts. Requests for such programming contracts has now begun to stall the programming incentive process. To ensure that the Commission's goal of encouraging the provision of new programming services is realized -- rather than ground to a halt in thousands of local contract review proceedings -- the Commission should provide an expedited clarification so that the FCC Form 1200 and 1210 process may move forward.

Should you desire additional information, please feel free to contact the undersigned.

Sincerely,

Wesley R. Heppler

cc: Blair Levin (Chief of Staff, Chairman Hundt's Office) (via Hand Delivery)
Merrill Spiegel (Chairman Hundt's Office) (via Hand Delivery)
Maureen O'Connell (Commissioner Quello's Office) (via Hand Delivery)
Lisa Smith (Commissioner Barrett's Office) (via Hand Delivery)
Jill Luckett (Commissioner Chong's Office) (via Hand Delivery)
Mary McMannis (Commissioner Ness' Office) (via Hand Delivery)
William Johnson (Cable Bureau) (via Hand Delivery)
Patrick J. Donovan (Acting Chief, Policy & Rules Division) (via Hand Delivery)
Joseph Van Eaton (Miller, Canfield, Paddock and Stone)

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FROM : JAMES O. ROBBINS 404 843 5804 1994,10-20 18:23 #154 P.02/03

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Cox Cable
Communications
A Division of Cox Enterprises, Inc.

James O. Robbins
President

October 20, 1994

The Honorable Reed E. Hundt
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

Dear Reed:

I am writing to express my grave concern about the resolution of the cable "going forward" proceeding.

When adopting its February 1994 order requiring cable operators to reduce their regulated rates by 17 percent, the Commission stressed that cable systems would nonetheless be given strong incentives under its rules to add the new programming services that have been the hallmark of cable's success with consumers. This message was reinforced by your speech before the industry at the NCTA convention in May.

In response to the Commission's request for additional thoughts and data on how the going forward rules might be crafted to provide such incentives, the industry labored over the summer and reached a consensus position. The significance of this accomplishment cannot be understated, given the diverse interests involved. The consensus position is supported almost unanimously by operators and programmers, large enterprises and small start-up companies alike.

As you know, the consensus of the industry is that recovery of a mark-up of 25 cents, plus the program license fee, is needed to incentivize operators to add new program services to regulated tiers. In recognition of concerns that rates not rise too quickly in any one year, the industry has also proposed that an annual cap of $1.50 be placed on rate increases due to the addition of such channels. Finally, in hopes of securing greater certainty in the application of the Commission's a la carte rules, the industry has suggested that, in addition to the 15 factors used to identify rate evasions, a "safe harbor" be created to assure cable operators that certain packages of a la carte channels will not be regulated if specific restrictions are followed.

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This consensus is not simply a political accommodation of divergent views. To the contrary, it is based on the real-life experience, expertise and business judgment of programmers and operators. Indeed, the proposed figures are supported by several sound economic studies in the record, as well as Cox's own analysis of regulated rates which it has submitted to the Commission. (see Cox Enterprises, Inc. Position Paper on FCC Cable "Going Forward" Proposals, submitted September 26, 1994)

Despite the record support for the industry's proposal, however, Cox has heard that the Commission may be considering numbers that are significantly lower. I urge you to evaluate carefully the record evidence and give the industry an opportunity to respond to any concerns you may have about that evidence before you reach a decision in this area. Cox strongly believes that rules which significantly discount the industry's figures will result in the continued stagnation of the programming marketplace: new channels simply will not be added to regulated tiers. This result would be disastrous for operators, programmers and, most importantly, consumers, who very much desire to purchase the new programming that systems and programmers wish to provide.

Cox also is extremely concerned that the Commission may be planning to severely curtail operators' flexibility with respect to a la carte packages. As explained in its previous filings on this issue, Cox will be unable to communicate with its subscribers in a 500-channel world if it is precluded, as a practical matter, from jointly marketing a la carte channels. It also must retain the flexibility to rearrange its service offerings to best respond to consumer and/or competitive demands -- particularly in view of the increasing competition from other multichannel video providers that the Commission is actively promoting. Cox earnestly believes that an appropriate policy solution can be crafted that preserves this needed flexibility (and the service innovation that results) while still preventing possible rate evasions.

With the Commission's VDT ruling today and the potential meagerness of what we believe may be in the "going forward" rules, it certainly adds to the urgency of upgrade/ rebuild relief at the earliest possible moment.

I would be happy to discuss my concerns with you in more detail. Please let me know if I can be of further assistance.

Sincerely,

Jim

James O. Robbins

JOR/mb

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JEFF TREEMAN
PRESIDENT

UNITED VIDEO, A UVSG COMPANY

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May 6, 1994

Alexandra Wilson
Acting Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, NW, Ninth Floor
Washington, DC 20554

Dear Ms. Wilson:

I am writing to bring to your attention a serious problem United Video has identified with the FCC's recently released "going-forward" regulations. If not addressed by the Commission, this problem will deter cable operators from adding distant broadcast signals to their cable line-ups. Therefore, we are suggesting a change in the Commission's approach which will ensure that the Commission's rules treat all types of programming equally and don't inadvertently favor one type of program service over another.

United Video is mindful of the complexity of these issues and commends the Commission for its hard work. We appreciate the Commission's well-intentioned attempts to address the concerns of the programming industry by permitting cable operators to mark up programming costs and to adjust rates for each channel added. Although a step in the right direction, these "incentives" do not address what we see as the fundamental problem with the Commission's going forward regulations: Cable operators and programmers are no longer able to time the addition of new program services with rate adjustments needed to cover the expense of adding new program services.

Since the purpose of this letter is to highlight a specific problem with the Commission's going forward scheme and those program services which are subject to copyright payment under the compulsory license, I will not go into detail on the appropriateness of the mark up or the per channel adjustment at this time. United Video intends to address these issues in greater detail by filing a Petition for Reconsideration.

As the Commission has correctly noted, copyright fees are a legitimate program cost for cable operators. Where the regulations fall short is that they treat all programming costs alike even though copyright fees for distant broadcast signals differ from other program costs in several significant respects. These differences make the Commission's proposed method of recovering program costs unworkable for the recovery of copyright fees for distant broadcast signals and will discourage cable operators from adding superstations in the future. While all cable operators will have to make major adjustments to accommodate the Commission's going forward scheme, for copyright payments the adjustment is likely to be so great that operators simply will not add these program services.

There are two program costs associated with carriage of distant broadcast signals: a per-subscriber service fee paid to companies such as United Video and a copyright payment paid to the Copyright Office. For the purpose of calculating copyright fees, the calendar year is divided into two copyright periods lasting six months each. Copyright fees are due at specific times as set in the statute and its implementing regulations. For the first copyright period, which runs from January 1 through June 30, cable operator payments are due between July 1 and August 29. For the second copyright period, which extends from July 1 to December 31, payments are due between January 1 and March 1.

Unlike licensing fees or other program costs for non-broadcast programming, cable operators and programmers cannot time the payment of copyright fees for broadcast signals so as to minimize the effect of the Commission's quarterly filing requirement for external cost pass-throughs. Copyright fees are payable semi-annually only at the dates specified.

Second, cable operator liability for copyright includes the entire copyright period in which the distant broadcast signal is added. This means that a cable operator which adds a distant broadcast signal on the last day of a copyright period must pay copyright for the entire six month period. Conversely, if a cable operator drops a distant broadcast signal on the first day of a copyright period, the operator remains liable for copyright fees for the entire six month period. Consequently, even if a cable operator wanted to, it could not time additions of superstations for the last day of a calendar quarter in order to receive more advantageous treatment under the Commission's proposed timetable for recovering external costs. Cable system operators cannot prepay these fees.

Finally, cable operators cannot negotiate more favorable copyright with the programmer for carriage of distant broadcast signals. Copyright fees are set in statute and are based generally on a percentage of the cable operators' applicable gross receipts.

Under the Commission's "going -forward" regulations, a cable operator is not permitted to pass through programming costs until they are incurred. Even though under copyright law a cable operator "incurs" liability on the day a distant broadcast signal is added (and that liability extends for the entire six months of the copyright period) the statutorily set payment schedule for copyright bars the operator from even initiating the process of passing through its legitimate program costs until well after the time the operator first incurs copyright liability.

By contrast, an operator can begin recovering the program costs associated with adding a program service not subject to statutory copyright payment much sooner. Indeed, an operator adding a new channel on the last day of a quarter can initiate the process to recover program costs the next day. The inability of cable operators to control the timing, amount or terms of copyright payments and the fact that copyright fees can be substantial will act as a significant deterrent to adding distant broadcast signals to cable systems.

To ensure that all program costs are treated similarly, United Video requests that the Commission allow operators to begin passing through statutory copyright fees associated with the addition of a distant broadcast signal when the signal is made available to subscribers. This could be accomplished if cable system operators are permitted to include estimated statutory copyright costs and carriage fees for distant broadcast signals on a Form 1210, provided that the distant broadcast signal is launched within 30 days of the date of the data used in the Form 1210 filing. As explained previously, the way statutory copyright fees are calculated makes addition of distant broadcast signals at the end of the quarter impractical. This means that cable operators are denied the opportunity to commence superstation carriage on those dates and take full advantage of the Commission's going forward regulations. By contrast, cable operators adding program services not subject to statutory copyright payments can take advantage of this timing to minimize the impact of the regulations. The change United Video seeks is necessary to prevent the Commission's rules from favoring one type of programming service over another.

Should the Commission determine that this matter would be better addressed in a Petition for Consideration, United Video respectfully requests that operators be allowed to begin passing through statutory copyright fees associated with the addition of a distant broadcast signal in the quarter following when the distant broadcast signal is added until the reconsideration process is completed. At a minimum this would permit an operator adding a distant broadcast signal on July 1 to initiate the process of recovering copyright payments on October 1 as is the case with other programming costs. While program services which are subject to statutory copyright payment would still receive less favorable treatment under the Commission's rules under this scenario, it would accord distant broadcast signals more equal treatment than is currently the case.

Sincerely,

Jeff Treeman
President
United Video

JT/gm

cc: Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Andrew C. Barrett

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National Cable Television Association

Daniel L. Brenner
Vice President for Law &
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October 21, 1994 92-266

Delivered by Hand

Ms. Meredith Jones
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

CABLE SERVICES BUREAU CHIEF

OCT 21 1994

CABLE SERVICES BUREAU

Re: Going Forward, MM Dkt. 92-266

Dear Ms. Jones:

We understand that the Commission is considering the possibility of allowing cable operators to add new networks to regulated tiers on an "incubation" basis. Under this arrangement, the operator would place a network new to the operator's system on a regulated tier for some period of time during which subscribers would have the opportunity to sample the programming offered by the network. After some period of time, the operator would be free to migrate the incubated network to an a la carte or other status, thereby freeing up a channel slot on the regulated tier for other services and permitting individuals who wish to continue to purchase the incubated service to do so.

One of the issues that has arisen in establishing an incubation policy is the allowable term for incubation after which an operator would no longer be free to migrate the channel without the channel losing its "incubated" status. (This question is in distinction to the situation where a network has long been on a regulated tier and is migrated off by the operator to an a la carte channel.)

We believe that the Commission should not establish a precise number of years before an operator must migrate an incubated network or the network loses its incubated status. Each programming network will develop its own audience in its own distinctive way. Some networks, containing programming elements that are well known and established to audiences will likely generate audiences much more quickly than more niche-type programming services that will have to find their audience. Furthermore, those networks that receive wide-scale carriage early (for example, networks that may be added pursuant to a retransmission consent agreement between operators and programmers) may have a different pattern of audience development than a network without a large initial audience. We believe that it would make more sense to allow the incubation policy to proceed through negotiations between programmers and operators to assure that marketplace forces rather than government fiat determine the appropriate length of the incubation period.

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Nevertheless, the Commission may wish to establish an incubation period. We have spoken with a number of our programming companies to determine the typical length of new network carriage contracts in the industry. While there is no set standard length, a five-year program contract is not atypical of the industry. Therefore, should the Commission determine that establishing an incubation time limit is necessary to protect the public interest, we would suggest five years as a reasonable time limit after which a network could not migrate from the regulated tier without being treated as other than an "incubated" service.

In terms of establishing a limit, matching the allowable incubation period with the network contract carriage limit makes considerable sense. The length of a carriage contract, as established by industry practice, reflects the judgment by both the operator and programmer as to an appropriate period during which the operator can measure the desirability of a particular service for its intended audience. It also permits the program network to have an opportunity to renegotiate the terms under which it will be carried, in the event that the operator wishes to continue to carry the network at the end of the contract period. To establish a shorter time limit for either party would establish an artificial limitation, imposed by government regulation, on the normal workings of the programming contract market. It might discourage an operator to even consider a network for incubation if it believed that it could not make a "stay or go" decision within the time limit. This would eliminate a carriage option for some networks and distort, by government policy, a result that might otherwise obtain.

Moreover, to the extent that consumers are affected by any migration of an incubated network, it is difficult to imagine a situation where at least some consumers would not be upset by migration even after a few weeks whereas other viewers, who may never sample the service or have no interest in it, would never even notice the change. This variation in consumer reaction to migration (along with the fact that the migrated channel will in all probability be replaced by another service, which might well appeal to a yet unserved part of the operator's market) makes reliance on consumer expectations an unreliable basis on which to determine the proper incubation period.

Therefore, we suggest that a typical program contract term, such as the five-year period, would be an appropriate limit if any limit is to be set at all.

Sincerely,

Daniel L. Brenner

DLB:tkb

cc: William F. Caton, Secretary

1230 Avenue of the Americas
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USA|NETWORKS

Stephen A. Brenner
Executive Vice President, Business Affairs, Operations and General Counsel

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

October 14, 1994

Ms. Meredith J. Jones
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, DC 20554

Dear Ms. Jones:

We understand that the Commission is considering modifying certain of the previously-announced rules as part of the current "going-forward" rulemaking. In particular, it is reported that the Commission may take away the cable operators' right to apply a seven and one-half percent markup to increases in license fees charged by programming services on regulated tiers. USA Networks believes that deletion of the markup would be inappropriate, would serve no public policy and would be at cross purposes with other actions which the Commission is contemplating.

There is a serious disconnect between solving the problems associated with the addition of new services and reopening the 7.5 percent markup on license fee increases for established services. An essential purpose of the 7.5 percent markup was to provide cable operators with an incentive to retain existing services within regulated tiers. This is unrelated to the need for other incentives to encourage the addition of new services. The fact is that there has not been significant substitution in regulated tiers. To that extent, at least, the markup has worked. The last thing that the industry needs is for the Commission to reverse a policy it adopted only recently. If the Commission were to do so, particularly when no comment was sought regarding this matter, it would only undermine the industry's confidence that it can rely on rules promulgated by the Commission.

Deletion of the 7.5 percent markup would seriously disadvantage existing networks. While we believe that the percentage level is too low, it does provide cable operators with some incentive to maintain stability of services in regulated tiers in the face of increasing costs associated with the carriage of those services. If anything has been clear in the last 18 months, it is that cable operators must be given some economic incentive, beyond the literal calculations of the benchmark rates, to maintain the level and quality of service in

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regulated tiers and must be given a greater incentive to add services to these tiers. From our discussions at the Commission, it appeared that this fact has been recognized and that cable operators will receive a markup for adding services to regulated tiers. We cannot understand why the pass-throughs with respect to existing services should be treated differently.

We also understand that the Commission is considering limiting the period of time in which new services may be "incubated" on regulated tiers. We believe that such a decision is best left to the marketplace. With the plethora of viewing alternatives available, it takes time for a subscriber to become acquainted with newly-added services. We see no reason for the Commission to set an artificial time limit by which a new service must be taken off a regulated tier.

At the risk of being repetitive, the primary problem facing both cable operators and programming services is uncertainty regarding the addition of new services. This uncertainty has led to 18 months of stagnation that has adversely affected every fledgling and new programming service. We urge the Commission to provide the industry with a comprehensive set of going forward rules with respect to new services.

If you have any questions regarding our views, please feel free to call me directly at (212) 408-8850.

Very truly yours,

Stephen A. Brenner

Stephen A. Brenner

cc: All Commissioners

1230 Avenue of the Americas
New York, NY 10020-1513
(212) 408-8850 fax (212) 408-8863

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USA | NETWORKS

Stephen A. Brenner
Executive Vice President, Business Affairs,
Operations and General Counsel

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

October 6, 1994

Kathy Wallman, Esq.
Common Carrier Bureau Chief
Federal Communications Commission
1919 M Street, NW
Washington D.C. 20554

Dear Ms. Wallman:

I wanted to thank you for taking the time to speak with me last week. I also wanted to reiterate that for new services, like the Sci-Fi Channel, it is crucial that the Commission not to delay its issuance of the "going-forward" rules. The simple fact is that, in the absence of such rules, cable system operators have no meaningful incentive to launch new channels, and in some cases, do not even know how to do so.

If you have any questions or issues which you would like to discuss, please feel free to contact me at any time.

Sincerely,

Steve Brenner

Stephen A. Brenner

SAB:dh

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CABLE SERVICES BUREAU

OCT 26 1994

CABLE SERVICES BUREAU CHIEF

October 24, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, D.C. 20554

Re: Elimination of 7.5% Programming Mark-up

Dear Chairman Hundt:

On behalf of Black Entertainment Television ("BET"), I am writing to express my concern about reports that the Commission may decide to eliminate the 7.5% markup on increases in existing programming services. Such a step would frustrate the ability of existing cable networks to continue to enhance the quality of their programming because it reduces the incentives of cable operators to pay increased fees for such improved programming.

As you may be aware, BET and many cable operators and cable programmers have filed Comments suggesting to the Commission that it replace the 7.5% markup in its "going-forward" rules with a markup of a flat amount of each added channel.[1] There have been reports that the Commission is considering replacing the 7.5% markup in its going-forward rules with a markup of a flat amount, and that would clearly be a step in the right direction. But there have also been reports that the Commission may eliminate the markup that applies to increases in costs of programming carried on existing channels--and that would clearly be a step in the wrong direction.

This is a matter of extreme importance to BET. We are no longer a fledgling service; BET has been in operation for 15 years, and we are now carried on cable systems serving over 35 million subscribers. But if we are to continue to grow our service, we will need to invest in quality programming that meets the still unfulfilled needs, demands and expectations of our viewers. To do this, we need to increase, periodically, our fees to cable operators. And we may not be able to do so if the effect is to erode the operators' margins. I have no doubt that subscribers will be willing to pay increased rates for the high quality programming that we will continue to add to our service. But cable operators may not be willing to pay increased fees unless they are able to recover some additional profit in return for their additional investment.

---

1 BET proposed that an additional "minority programming incentive" be incorporated into such a mark-up scheme. This incentive would double the amount of the mark-up for minority programmers.

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Black Entertainment Television.

1232 31st Street, N.W.
Washington, D.C. 20007

Accordingly, I strongly urge the Commission to retain the 7.5% markup on additional programming costs incurred in connection with existing channels of programming and to replace the 7.5% mark-up with a flat markup. Retaining a markup of some form for existing channels is appropriate and necessary to ensure adequate incentives to invest in improvements in existing program services.

Sincerely,

Robert L. Johnson
President and Chief Executive Officer
BLACK ENTERTAINMENT TELEVISION, INC.

Enclosure

cc: Honorable Andrew C. Barrett
Honorable Rachelle Chong
Honorable Susan Ness
Honorable James H. Quello
Meredith Jones, Chief, Cable Services Bureau

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OFFICE OF THE ATTORNEY GENERAL

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DEPARTMENT OF LEGAL AFFAIRS

THE CAPITOL

TALLAHASSEE, FLORIDA 32399-1050

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

Reply to:

Office of the Attorney General
4000 Hollywood Boulevard, 505-South
Hollywood, Florida 33021

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

October 17, 1994

Reed Hundt, Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC zip code

Dear Chairman Hundt:

The Attorneys General of the States of Arkansas, California, Connecticut, Delaware, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nevada, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington and Florida are concerned that certain cable companies are attempting to persuade the Commission to adopt regulations regarding "a la carte" services that would allow cable operators to dupe the public into paying for services that have not been affirmatively requested by name.

As you are aware, state Attorneys General throughout the country are interested in working with the Commission to ensure that regulations adopted to implement the 1992 Cable Act provide American consumers with the positive benefits Congress intended. To this end, we commend the Commission's current regulations which meet the Congressional mandate that negative option marketing be prohibited and recognize the states' long standing consumer protection role in such matters.

Recently, eight states filed suit against Comcast Cable Communications alleging that Comcast's marketing of two new services, Valu-Pak and CableGuard, violate the respective state Unfair or Deceptive Trade Practice statutes. We contend that the company has used negative option billing to automatically charge consumers for these so-called "optional services". Our concerns focus on the manner in which these services are being marketed, not the amount charged to receive these services or if these services are offered on an "a la carte' basis.

These lawsuits are not an attempt to become cable rate regulators or to otherwise expand state jurisdiction in this area. Rather, the states are continuing their efforts to protect consumers against negative option marketing. As Senator Gorton noted positively on the Senate floor when he urged for the 1992 Cable Act's passage, eleven states took similar enforcement action in the summer of 1991 to halt the negative option marketing of the "ENCORE" channel by TCI.

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The States commend the Commission's efforts to meet the Congressional mandate that negative option marketing be prohibited. We believe the Commission's current regulations accurately recognize the State's long standing consumer protection role. We strongly urge the Commission to maintain this correct regulatory posture.

Respectfully Submitted on behalf of the Attorneys General of the States listed below:

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Attorney General of the
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J. Jordan Abbott
Assistant Attorney General

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Attorney General of the
State of California
Albert N. Shelden
Supervising Deputy Attorney General

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State of Rhode Island
Christine Jabour
Assistant Attorney General

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Attorney General of the